SUMMARY OF *AMBASSADOR, INC.* BRIEFS

The appellants (the hotels) appealed the Ambassador case to the Supreme Court because the District Court for the District of Columbia had enjoined the hotels from making their surcharges to guests on their long distance calls, which violated the tariff of C&P Telephone Co. and AT&T. The tariff stated that message toll telephone service furnished to hotels would not be made subject to any charge by any hotel.

The District Court's Oral Opinion enjoining the hotels was part of the Court's record. The opinion states that the FCC was created for the benefit of the public and to protect the public from being overcharged. It found that the hotels' surcharges violated the tariff. It stated that the hotels were accomplishing what the "telephone company is not allowed to do, and what the law, by its express and implied terms, and by the regulations of the Commission, and its orders, did not mean to allow." The hotels claimed their charges were justified because they needed to recoup the costs of the secretarial type work they were providing their guests (taking messages, etc.) But the court said they could recoup their costs in other ways (for example, increase the rates for rooms, food and drinks).

The Hotels' Brief:

The hotels argued that only carriers are required to file tariffs showing charges for itself and its connecting carriers for interstate and foreign wire communication. They argued that their surcharges were not for the benefit of the phone company but for those costs incurred by the hotels for providing secretarial services to their guests, such as the taking of messages, connecting calls at guests' requests, locating guests to receive calls, etc. They also argued that they are not connecting carriers, but subscribers of the telephone company. Even if they were connecting carriers, they argued that the tariff would be unenforceable against them because the hotels had not agreed to or concurred in the schedule. They argued that the schedule was unenforceable because it regulates charges for services which are not for wire communications, but for secretarial services.

They asserted that to hold that the operation of a PBX board with operators and secretaries as "wire communication" would place many businesses under the purview of the Act and the Commission. "It is inconceivable that what all such firms, business houses, and courts do is within the term 'wire communication' by a carrier for the purposes of the Act." The Commission would be permitted to regulate the business of many other organizations on the same theory that it seeks to regulate the service between the PBX board and the extension telephone as wire communication. They argued that charging guests for the secretarial services provided when making phone calls by adding a surcharge to the telephone company's charge is the fairest way to recoup the costs from guests because those guests making calls are the ones using the secretarial services. They claimed that guests were not confused into thinking that the surcharges were charges of the telephone company.

They argued that Section 203 deals only with the charges of carriers and with the rules, regulations or practices affecting such charges. Just because a condition is stated in a tariff, it does not bind the subscriber and its business practices.

They also claimed that Section 411(a) cannot be violated by the hotels when the telephone company was not found to have violated 411(a).

The Government's Brief:

The U.S. argued that the definition of "wire communication" is comprehensive and includes all transmission between the points of origin and reception of such transmission, as well as all instrumentalities, facilities, apparatus, and services incidental thereto. The U.S. stated that the PBX system and its operators, whether or not supplied or controlled by the hotels, are instrumentalities, facilities, apparatus and services incidental to the transmission of calls, just as the central exchange system, wires, instruments and services supplied and controlled by the telephone companies are. "Acceptance of appellants' contention would substantially frustrate effective public regulation of charges for interstate and foreign communication service, for it would mean that appellants and others similarly controlling access to the use of telephones would be able freely to resell telephone service to the public and impose charges thereon additional to the charges specified in the telephone companies' filed schedules."

The U.S. also stated that under the hotels' theory the Commission could prescribe rates on long distance calls to and from the PBX board, but neither the Commission nor any other agency charged with the regulation of telephone rates could prevent any amount of additional charges being assessed against the guests making or receiving the call. The U.S. asserted that this result would be contrary to the underlying policy of the Communications Act and pointed to the Commission's Order which asserted that its role as regulator of rates could be undermined.

The hotels' surcharges are based upon telephone service supplied to guests, not the hotel services supplied. As such, they should be included in schedules filed under Section 203 of the Act. Section 203 is not limited to charges which accrue only to the financial benefit of the carrier. The U.S. explained that the Communications Act was "designed to afford 'safeguards against excessive and discriminatory charges to the using public,' and unless its language compels otherwise it should be construed to that end."

Carriers may lawfully condition service in their tariffs. Regulations defining the rights, privileges, and restrictions attaching to a particular type of service offered are commonplace in tariffs. There is no effort to control the hotels' businesses, as they may recoup their secretarial expenses through other means. "The thrust of the regulation is merely at the practice whereby the hotels, in the guise of reimbursing themselves for hotel services, in fact subject the use of interstate and foreign telephone service to charges not contained in the published effective tariffs for such service."

The U.S. rejected the assertion that injunctions may be issued under Section 411(a) against entities that are not carriers only when necessary to aid in the enforcement of the Act against carriers. Though Section 203(c) speaks in terms only of carriers, the U.S. stated that the section was not intended to supersede the general principle of rate regulation that once a valid tariff is filed it has the force and effect of law, and must be complied with by both carrier and customer until changed or set aside.

It also stated that Section 411(a) supplements Section 203(c) to the extent of authorizing judicial action to bring about compliance with a filed tariff by all persons "interested or affected" thereby, whether or not they are, or are acting for, carriers upon whom the express obligations of Section 203(c) are placed. But the U.S. did not rely on this. Rather, it stated that the record shows that the telephone companies were violating their tariff because they knew that the hotels continued to add surcharges in violation of the tariff. While no injunction was in fact issued against the telephone companies, Section 411(a) authorizes that making of orders and decrees against additional parties "in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers" -- not merely to the same extent as such orders or decrees *are* issued against carriers.

Telephone Companies' Brief:

The telephone companies explained that the language in the tariff is a condition of service upon subscribers and that the surcharges imposed by the hotels violates the tariff. The surcharges impact the business of the telephone company because they are a deterrent to the use of the service and a "disturbing element in the relations of the telephone companies with the public." The surcharges are collected only when the toll service of the telephone company is used, and the surcharges are determined by the amount of the telephone company's charge. The tariff merely impacts the use of telephone service; it does not regulate the hotels' businesses. The tariff is valid, and the hotels must comply with it. To the extent that the telephone companies provided service to hotels while they continued to add surcharges was for four days until this case was brought.

Chesapeake and Potomac Telephone Company, by mailing a copy of same, postage prepaid, on September 25, 1944, to Spencer Gordon, Esq., Attorney for the Chesapeake and Potomac Telephone Company, Union Trust Building, Washington, D. C.

Joseph W. Wyatt.

Sworn to and subscribed before me this 25th day of September, 1944. Therese M. Tangora, Notary Public, D. C. My Commission expires January 14, 1946.

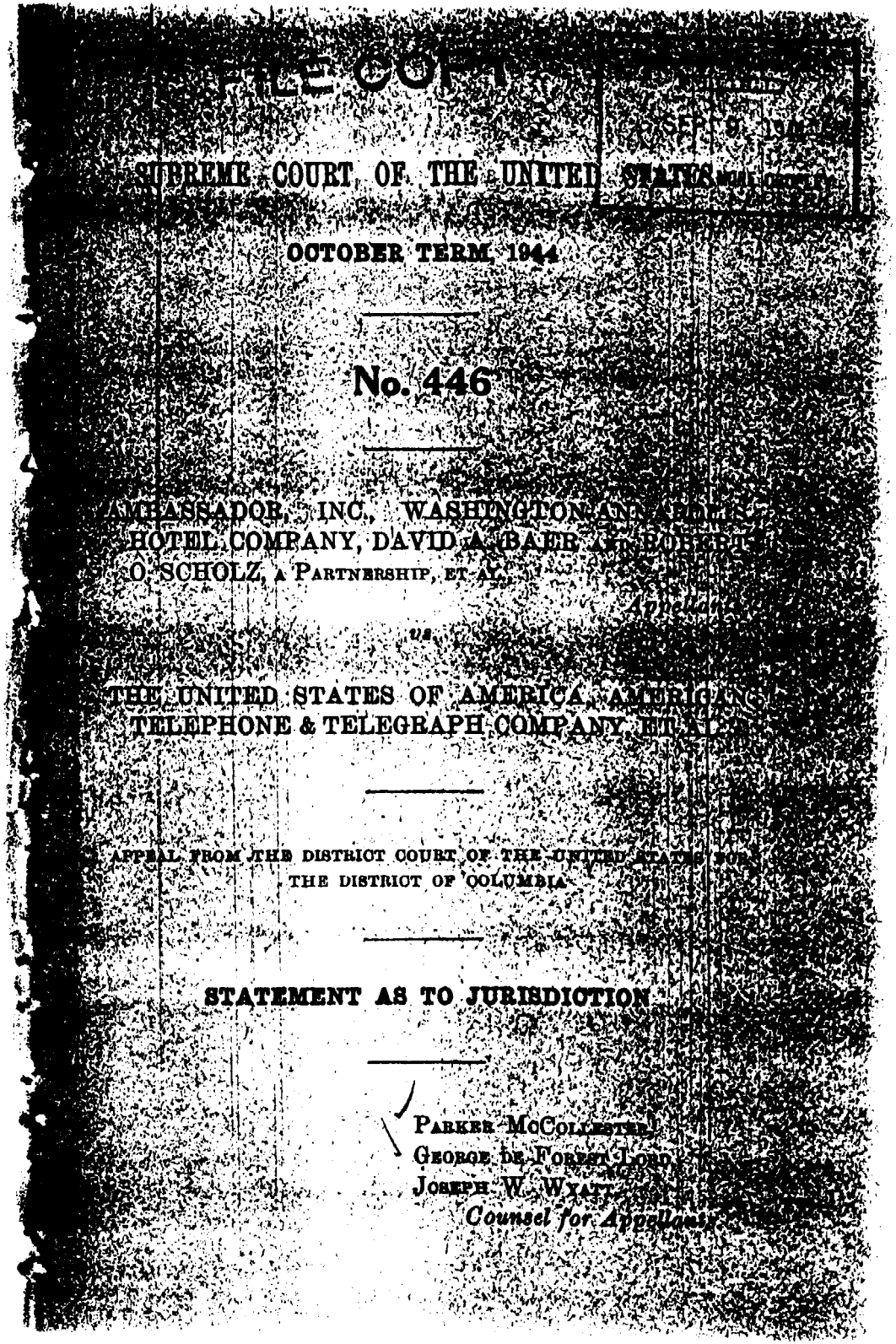
[fol. 594a] [File endorsement omitted]

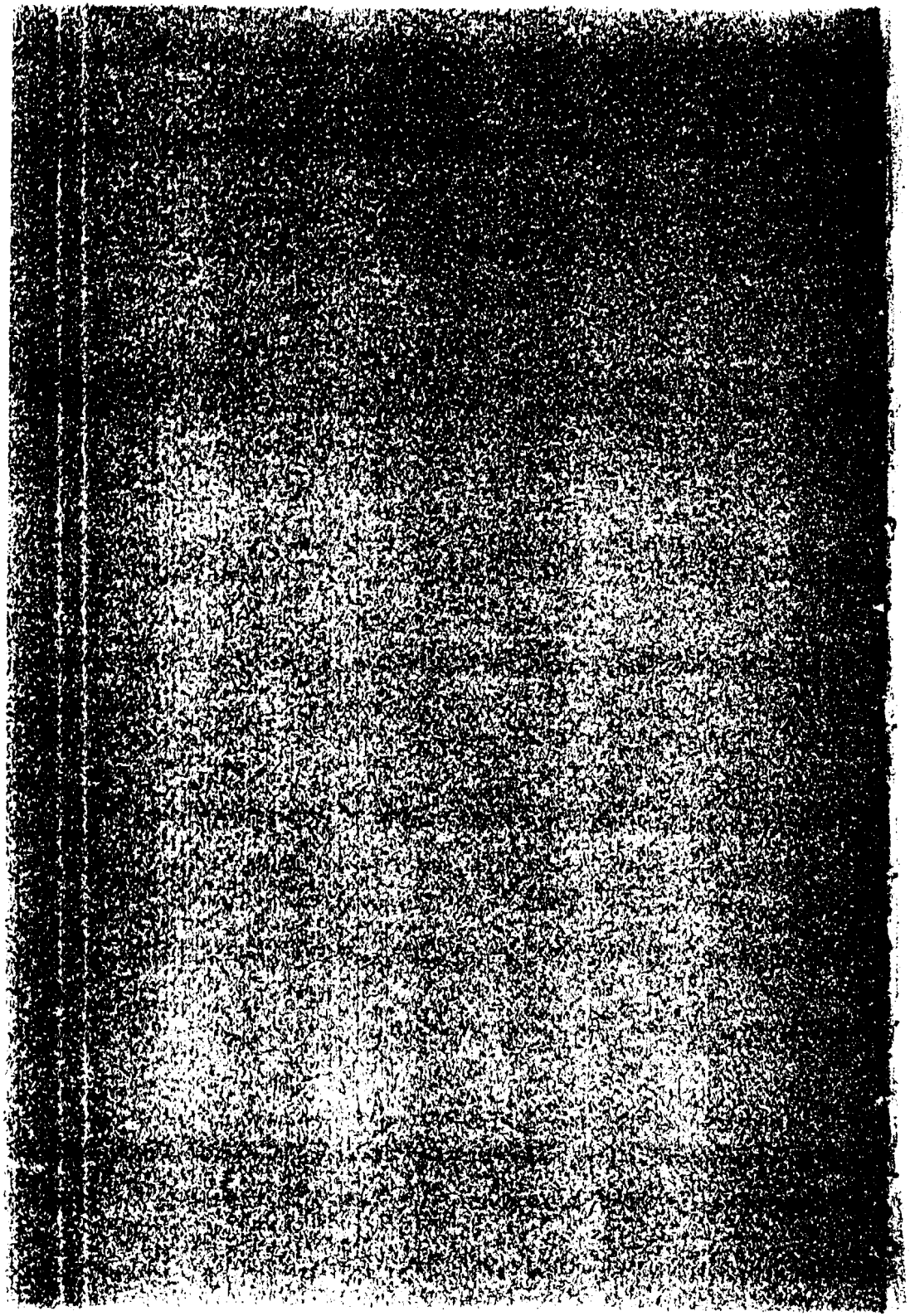
[fol. 595] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—November 13, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 48899. District of Columbia, D. C. U. S. Term No. 446. Ambassador, Inc., Washington-Annapolis Hotel Company, David A. Baer & Robert O. Scholz, a Partnership, et al., Appellants, vs. The United States of America, American Telephone & Telegraph Company, et al. Filed September 9, 1944. Term No. 446, O. T. 1944.





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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23189

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Defendants.

STATEMENT AS TO JURISDICTION

(Filed August 2, 1944. Charles E. Stewart, Clerk)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Ambassador, Inc., Washington-Annapolis Hotel Company, David A. Baer & Robert O. Scholz, Washington Properties, Inc., The Carroll Arms Hotel, Inc., Commodore Hotel Corporation, Hamilton Realty Corporation, Harrington Hotel Company, Inc., Washington Hotel Company, Dodge Hotel Corporation, James S. Gore, Hay Adams Corporation, The Lafayette, Inc., The Lee Sheraton Corporation, Linwood Hotel Corporation, Mayflower Hotel Corporation, New Colonial Hotel, Inc., Lawrence Gassenheimer, Robert D. Blackistone, The Raleigh Hotel Company, Oscar A. de Lima & Edwin A. de Lima, Shoreham Hotel Corporation, Hotel Statler Company, Inc., Twenty-Four Hundred Sixteenth Street,

Inc., Washington Properties, Inc., Texwash Corporation, and The Willard, Inc., defendants in the above entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the decree of the District Court.

This is a suit in equity brought in the District Court for the District of Columbia by the United States of America, as complainant, at the instance of the Federal Communications Commission, under the authority of Section 401(c) of the Communications Act of 1934 (47 U. S. C., Sec. 401(c)) to obtain a decree against the defendant telephone companies and defendant hotel companies enjoining alleged violations of Section 203 of said Act (47 U. S. C., Sec. 203). The District Court granted the injunction against the defendant hotel companies in a decree entered the 8th day of June, 1944.

A. Statutory Provisions On Which Jurisdiction Rests

The Statutory provisions that confer jurisdiction upon the Supreme Court to review the decree of the District Court are:

Section 401(d) of the *Communications Act of 1934*, 48 Stat. 1092, 47 U. S. C., Sec. 401(d), which reads as follows:

> "The provisions of the Expediting Act, approved February 11, 1903, as amended, and of Section 238(1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under Title II of this Act, wherever the United States is complainant."

Section 2 of the *Expediting Act*, approved February 11, 1903, as amended, 32 Stat. 823, 36 Stat. 1167, 15 U. S. C., Sec. 29, 49 U. S. C., Sec. 45, which reads as follows:

> "In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

Section 238(1) of the *Judicial Code*, as amended, 36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345(1), which reads as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:
>
> (1) Section 29 of Title 15, and section 45 of Title 49.
>
> • • • • • • •

The three conditions set forth in Section 401(d) of the Communications Act of 1934, *supra*, are met in the present case, to wit, it is a suit in equity, it arises under Title II of said Act, and the United States is the Complainant.

The Supreme Court has held that the Expediting Act, approved February 11, 1903, as amended, and Section 238 of the Judicial Code, as amended, provide for direct appeal to the Supreme Court from a District Court:

Ethyl Gasoline Corporation v. *United States* (1940), 309 U. S. 436.

B. The Statute of the United States Involved in the Suit

The validity of a Statute of the United States is not involved, but the suit does involve the interpretation and application of Section 203 of the *Communications Act of 1934*, 48 Stat. 1070, 47 U. S. C., Sec. 203, which reads as follows:

> "(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for

interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communications unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or

(2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense."

C. Dates of Decree and Petition for Appeal

The date of the final decree of the District Court, here sought to be reviewed is June 8, 1944. It reads as follows:

"Order for Permanent Injunction

This cause came on to be heard before the Court on the complaint of plaintiff seeking a permanent injunction, and on the answers of defendants. After a trial held on April 26 and 27, 1944, in which the testimony of witnesses, other evidence, and argument of counsel were presented, the Court found for plaintiff against defendant hotel companies herein, and is this day entering Findings of Fact and Conclusions of Law in support of its judgment.

It appearing that on January 22, 1944, defendant The Chesapeake and Potomac Telephone Company filed with the Federal Communications Commission, as part of its tariff schedules applicable to interstate and for-

eign message toll telephone service, a new tariff regulation, effective February 15, 1944, and which was concurred in by defendant American Telephone and Telegraph Company, providing as follows:

> 'Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club, in addition to the message toll charges of the Telephone Company as set forth in this tariff.'

It further appearing that notwithstanding the provisions of this tariff regulation, and the provisions of Section 203 of the Communications Act of 1934, as amended, defendant hotel companies have since February 15, 1944, continued to collect extra charges, or surcharges, from individuals using telephone private branch exchange extension stations on the premises of defendant hotel companies to make and receive interstate and foreign telephone toll calls, in addition to the regular and effective tariff charges of defendant telephone companies, and the Federal tax, applicable to such calls.

It is, therefore, this 8th day of June, 1944, adjudged, ordered, and decreed, that the defendant hotel companies, and each of them, and all persons acting under the authority or control of each of them, including their officers, agents, servants, and attorneys, be, and they, and each of them, are hereby enjoined and restrained from charging, demanding, collecting, or receiving any charge for and in connection with any interstate or foreign message toll telephone service to or from the premises of defendant hotel companies, other than the message toll telephone charges set forth in the applicable and effective tariff schedules of defendant telephone companies on file with the Federal Communications Commission, and the applicable Federal taxes.

The Court retains jurisdiction over this proceeding in order that it may issue any other injunction against defendants, or any of them, as may appear necessary to effectuate its decision.

By the Court.

(S.) DANIEL W. O'DONOGHUE,
Associate Justice.

Petition for allowance of appeal was presented on August 2, 1944.

D. Substantial Nature of Questions Involved

This is an action in equity instituted under the provisions of Section 401(c) of the Communications Act of 1934, at the request of the Federal Communications Commission, alleging violations by the defendant telephone companies and twenty-seven hotels in the District of Columbia of the provisions of Section 203 of the Communications Act.

The hotels in the District of Columbia, like hotels generally at the present time, provide telephone instruments in hotel rooms so that guests can make and receive calls in their rooms, take and deliver telephone messages for guests, page their guests, and perform other secretarial services. It has been their practice for many years to reimburse themselves for the cost of these services by what are called "service charges" made to guests making telephone calls from their rooms.

In 1942, an investigation of the practices of the telephone companies and the hotels in the District of Columbia was undertaken by the Communications Commission, which by its report and order dated December 10, 1943, found that the services rendered by the hotels were toll telephone communications services subject to the provisions of the Communications Act of 1934 and that any charges therefor should be shown in tariffs filed with it by the telephone companies un-

der the provisions of Section 203 of the Act, or that tariffs should be filed which contained specific provisions with respect to the conditions upon which telephone service would be furnished.

In supposed compliance with the order of the Communications Commission, the telephone companies filed a tariff schedule, which purported to become effective on February 15, 1944, providing as follows:

> "14. *Service Furnished to Hotels, Apartment Houses and Clubs*
>
> Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff."

The hotels thereafter continued to make their charges and the telephone companies continued to furnish toll telephone service to the hotels, whereupon this action was instituted. The section of the Act alleged to be violated is Section 203 requiring common carriers to file tariffs showing their charges and their classifications, practices and regulations affecting such charges and prohibiting them from making other charges or extending to any person any privileges or facilities in communication except as specified in their tariff schedules.

The District Court found that the telephone companies were not violating the Act and should not be enjoined but that the hotels were violating the Act and should be enjoined.

The questions presented include the following:

1. Whether the services rendered by hotels are toll telephone communications services subject to the Communications Act of 1934, charges for which, if any, must be shown in tariffs filed with the Communications Commission.

2. Whether the Communications Commission has jurisdiction over the charges of hotels for their services of the character involved.

3. Whether, if the services for which the hotels make their charges are hotel services and do not constitute toll telephone communications by a common carrier within the application of the Communications Act of 1934, the telephone companies may make the furnishing of their toll telephone service conditional upon what the hotels charge for their hotel services in the conduct of their hotel business.

4. Whether hotels, which are not common carriers subject to the requirements of the Communications Act of 1934, can be found guilty of a violation of those provisions and whether an injunction may issue against the hotels, when the telephone companies which are carriers subject to the Communications Act, 1934, are found not to be violating the statute and no injunction is issued against them.

There has as yet been little judicial interpretation of the provisions of the Communications Act of 1934 upon which this action rests. The questions presented are questions as to which no controlling precedents have as yet been announced. They are questions of great concern not only to the hotels in the District of Columbia and to the telephone companies operating there, but also to hotels, clubs and apartment houses and the telephone companies throughout the country.

Furthermore, the amounts involved are very substantial, the charges which the hotels have heretofore collected amounting on the average to several thousand dollars annually for each hotel, so that the aggregate amount of the charges for the hotels directly involved in this case, being

the hotels in the District of Columbia, will exceed $100,000 annually and the aggregate amount of the charges of all hotels interested in the questions involved will be many times this figure.

Oral Opinion

A copy of the transcript of the oral opinion delivered by the Court in deciding this case is affixed hereto and marked "Exhibit A."

Conclusion

It is thus clear that this appeal is within the exclusive jurisdiction of the Supreme Court and involves the review of substantial errors of the trial Court.

Respectfully submitted,

PARKER MCCOLLESTER,
GEORGE DE FOREST LORD,
Attorneys for Defendant Hotel Companies,
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New York 4, New York.
JOSEPH W. WYATT,
Attorney for Defendant Hotel Companies,
Southern Building,
Washington 5, D. C.

August 2, 1944.

EXHIBIT A

ORAL OPINION OF THE COURT

Pages 348 to 357
of Transcript

"In the first place the Court holds that the law and the regulations involved in this case, whereby the Federal Communications Commission was established and acts, are lawful and valid.

The Court holds that this Court has jurisdiction of the subject matter of this case and of the parties, and that the Federal Communications Commission likewise had jurisdiction of the matter of the tariff schedules, and so on, that were made governing the two defendant telephone companies and others engaged in the telephone business.

Now that covers the points of law that have been raised here.

The Court holds that any relief along the lines of the tariff schedules, that the hotels here may wish, or that the telephone companies here may wish, should be taken up before the Federal Communications Commission.

Now on the matter of motions to strike out certain testimony, or objections, rather, to the admissibility of certain testimony, the Court rules now that it is not to consider and will not consider in its decision any of the testimony, oral or written, that was offered in this case in regard to a proposed 15 per cent commission to be paid by the telephone companies to the hotels. That was merely an offer. It didn't go so far as to be called an offer of compromise because there is no controversy in regard to money or charges between the telephone companies and the hotels. It may be a businesslike proposition on the part of the telephone companies to try to help the hotels out, because they are mighty good customers of the telephone companies.

But whatever the motive was that prompted it, it wasn't an offer of compromise, and even if it were, the Court shouldn't consider it because it was never carried through; and if it was a generous offer—I doubt whether I could go

so far as to say it was—but if it was a businesslike proposition, or if selfish interests were governing the telephone company, whatever it was, it doesn't bear upon the essential issues of law and fact in this case.

Therefore, the Court is not considering any of the evidence, oral or written, that was introduced here in regard to that proposed payment of 15 per cent of the toll charges to the hotel defendants.

Now there has been testimony offered here to show that what the hotels put on the bills of those guests who used the long distance phones was a reasonable charge for secretarial service or hotel service, or whatever else you wish to call it. Well, the Court will not consider or go into the question of whether it is reasonable or unreasonable, because that isn't an issue in this case. Maybe it is most reasonable, and maybe the hotel guest is very well pleased with the amounts that have been charged for the accommodation and services rendered. But that isn't here before me.

I couldn't undertake to say that the hotels are rendering services worth 15 percent of the charge for long distance calls, and therefore could be able to add that amount to the bills of their guests; I couldn't say that the ten per cent that they are apparently charging is too much or a fair charge, or what. So the Court is going to disregard the testimony concerning the reasonabl-ness of this charge, or surcharge, that the hotels are making to their guests for long distance calls. So that is eliminated from the case.

Now although it may not be required of the Court—because the Federal Communications Commission takes an alternative position—to pass upon the issue as to whether the hotels are agents of the telephone companies, or whether they are to be regarded as subscribers, I think a Court ought to take a stand on that because that is a vital issue in this case.

With all due respect to the plaintiff in this case, the Government, I think they ought to come into Court on a definite theory and not leave the Court to choose, and the plaintiff say, 'Well, take this and if you don't like it, take that and make it the basis of your decision.'

In the opinion of the Court the testimony in this case actually fails to show that these hotels are the agents of the telephone company. There was no written agreement to that effect introduced here; there was no oral agreement to that effect introduced here; and there is no testimony, written or oral, from which this Court could imply the existence of any agency in the hotels on behalf of or as agent of the telephone company.

In the opinion of this Court the hotels are subscribers. They enter into a contract with the telephone company. 'You render us such and such service and we will pay you such and such money'. They get the bill every month or two and they pay the telephone company—that was the evidence in this case—the amount that they owe them as subscribers for telephone service from the telephone company.

Now that being so, the telephone companies have no control whatever over what these hotels are doing in regard to this surcharge. But they have knowledge of it. At least, if they didn't have knowledge of it before this case came up, they have knowledge of it today. As a matter of fact the testimony shows that they have had knowledge of it for some time because they have discussed the matter and endeavored to make some settlement of it.

So the telephone companies are charged with what the hotels are doing in regard to these surcharges they are making on the bills of their guests, for toll or interstate messages.

Now that brings up the question of why we have a Federal Communications Commission. Well, maybe some people wish we didn't have it.

Then the question comes up as to what persons, what property or what purpose this Federal Communications Commission was established for. I take it that without doubt it was established for the benefit of the public, and to protect the public in regard to such matters as those involved in this case. They didn't want to leave the public at the mercy of the telephone companies, having a monopoly, as one witness undertook to say, or maybe I suggested it to him. But any way, monopoly or no monopoly, this Act and these Regulations and these tariff schedules in regard to

telephone messages going out through the states, all have the principal purpose of protecting the public against being overcharged. If we didn't have the Federal Communications Commission, and didn't have the regulations, and didn't have these tariff schedules, the telephone companies could say, if you wanted to talk to John Jones in New York, 'Ten Dollars', or 'Twenty Dollars.' The man calling New York from Washington would say, 'That is too much.' They would say, 'Well, if you think it is too much you can't talk, you can take the train and go up and see him.'

Well, you know such things have been done in the past by corporations, especially by public utilities when they weren't under control.

I have said that because the public are the ones to be primarily protected by this Commission and by the law establishing it, and by the Regulations and Orders that it has made.

If someone who is connected with getting these messages from the person telephoning, to the receiver in New York, the person receiving the message, if somebody else who has some connection or part in transmitting those messages undertakes to slap on an extra charge, whether it is 5 per cent, 10 per cent, 20 per cent, or maybe 50 per cent, or it might even be 100 per cent, just doubling it up, if that were permitted it would be negativing in part, or maybe entirely, the purpose of this Commission and the purpose of this law and of the regulations and orders of this Commission, and the public would not be protected in regard to their interstate telephone messages.

Now, that being so, if someone who has gotten telephone facilities as a subscriber, from the telephone company—and they have gotten those facilities for their own benefit, to accommodate their guests in the hotel—undertakes, when the messages are going through, to render services to the guests, and then undertakes to surcharge and make the charge go above, in amount, the tariff schedule, that would be doing indirectly what the telephone company is not allowed to do, and what the law, by its express and implied terms, and by the regulations of this Commission, and its orders, did not mean to allow.

Now under those circumstances I think that the hotels—it isn't for me to say what they should do—but they could render less service because they were not getting paid for it, just like you could put dimmer lights in the rooms of a hotel, instead of 60-watt lights you could put in 40-watt lights—that is up to the individual hotel. They are in competition with one another and they can spend as little or as much as they see fit in trying to get guests and patrons and trying to keep them.

So in this case they don't have to render all the service that they do. And if it is too expensive—they all appear to be pretty well organized here—they can all agree to cut down on the expense where they are losing money. They could do that or they could charge for these services separately under some other item, whatever they might wish to call it—secretarial services, accommodation for this or that. Or they could go before the Federal Communications Commission and ask to have an allowance put in the tariff schedule; or they could go to the Rent Commission and because of the action of this Court—if an injunction is granted—could say, 'We should get more rent for our rooms'. Or the hotels could go to the food or the drinks commissions and try to get them to permit a raise in the price of food or drinks.

But that is up to the hotels; they will just have to figure out a way to get the money; and if they can't get it this way they will either have to cut down the service or get it some other way.

Then—of course I needn't suggest it but—if they want to they have the proposition made to them of getting 15 per cent from the telephone company.

As I say, these suggestions I have made are just thoughts, but they don't enter into my decision at all. The hotels have, as I have indicated, a number of possible ways in which they may recoup the losses they say they are sustaining; but the Court isn't concerned with that, that is a worry of the hotels and not of this Court.

Accordingly the Court considers that in this case, while it could enjoin these telephone companies if the facts of the case required, from the facts in this case it appears that

the telephone companies are not violating the tariff schedules at all, and therefore there is no remedy that should be granted at this time against the telephone companies for any acts of their own. Since the Court has held that the hotels are not the agents of the telephone companies, therefore the telephone companies are not responsible for what the hotels are doing now.

But the hotels know what they are doing, and the Court holds that they are responsible for what they are doing, and they are making the public pay more for toll charges, or for interstate telephone charges than what the Federal Communications Commission has allowed, and therefore they are violating this tariff schedule of the Federal Communications Commission, they are violating the law, and violating the rules of the Federal Communications Commission, and should be enjoined accordingly.

So the Court will grant an injunction restraining the hotels from adding these surcharges to the bills of the guests of the hotels, in addition to the regular charges for the interstate toll charges.

The Court will further reserve, in this case, jurisdiction of it so that should the hotels refuse to obey the order of this Court, enjoining them from making these charges, and the telephone companies, knowing that they have made these charges and that they are still making them, and that by rendering them phone service they will thereby be aiding and abetting them, and indirectly, maybe; encouraging them to violate the order of this Court and the order of the Federal Communications Commission, then the Court would feel that it would have jurisdiction and authority to enjoin the telephone companies by mandatory injunction, or prohibitive injunction, rather, prohibiting them from rendering any further service to those hotels.

That, I think, covers all the issues in the case.

Counsel can confer together and prepare findings of fact, conclusions of law, and a judgment in the case."

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 446

AMBASSADOR, INC., *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, and THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

PARKER MCCOLLESTER,
GEORGE DEFOREST LORD,
JOSEPH W. WYATT,
Attorneys for Appellants.

February 16, 1945.

the telephone companies are not violating the tariff schedules at all, and therefore there is no remedy that should be granted at this time against the telephone companies for any acts of their own. Since the Court has held that the hotels are not the agents of the telephone companies, therefore the telephone companies are not responsible for what the hotels are doing now.

But the hotels know what they are doing, and the Court holds that they are responsible for what they are doing, and they are making the public pay more for toll charges, or for interstate telephone charges than what the Federal Communications Commission has allowed, and therefore they are violating this tariff schedule of the Federal Communications Commission, they are violating the law, and violating the rules of the Federal Communications Commission, and should be enjoined accordingly.

So the Court will grant an injunction restraining the hotels from adding these surcharges to the bills of the guests of the hotels, in addition to the regular charges for the interstate toll charges.

The Court will further reserve, in this case, jurisdiction of it so that should the hotels refuse to obey the order of this Court, enjoining them from making these charges, and the telephone companies, knowing that they have made these charges and that they are still making them, and that by rendering them phone service they will thereby be aiding and abetting them, and indirectly, maybe; encouraging them to violate the order of this Court and the order of the Federal Communications Commission, then the Court would feel that it would have jurisdiction and authority to enjoin the telephone companies by mandatory injunction, or prohibitive injunction, rather, prohibiting them from rendering any further service to those hotels.

That, I think, covers all the issues in the case.

Counsel can confer together and prepare findings of fact, conclusions of law, and a judgment in the case."

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Opinion of the Court Below

The trial court rendered an oral opinion which is not included in an official report. The oral opinion appears in the record at pages 50-55. The findings of fact and conclusions of law are printed at pages 55-67 of the record.

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked

The jurisdiction of this Court is invoked under the following statutory provisions:

(a) Section 401(d) of the *Communications Act of 1934*, 48 Stat. 1092, 47 U. S. C., Sec. 401(d), which reads as follows:

"The provisions of the Expediting Act, approved February 11, 1903, as amended, and of Section 238(1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under Title II of this Act, wherever the United States is complainant."

(b) Section 2 of the *Expediting Act*, approved February 1, 1903, as amended, 32 Stat. 823, 36 Stat. 1167, 15 U. S. C., Sec. 29, 49 U. S. C., Sec. 45, which reads as follows:

"In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

(c) Section 238 of the *Judicial Code*, as amended, 36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345, which reads in part as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49."

This Court has jurisdiction under these provisions since (a) this is a suit in equity under Title II of the Communications Act; (b) the United States is the complainant, and (c) the case is here on direct appeal from a final decree of the District Court taken within sixty days from the entry thereof (the decree of the District Court was entered on June 8, 1944, and the appeal was allowed by an associate justice of said court on August 2, 1944).

This Court noted probable jurisdiction on November 13, 1944 (R. 306).

Statement of the Case

The Nature of the Action

This is a civil action instituted in the District Court of the United States for the District of Columbia in the name of the United States as complainant but at the request of the Federal Communications Commission. The complaint alleges that the action was brought pursuant to the provisions of Section 401(c) of the Communications Act of 1934* (hereafter generally referred to as the Act) to enjoin violation of Section 203* thereof by defendants (R. 4). The defendants named were the American Telephone and Telegraph Company and the Chesapeake and Potomac Telephone Company, herein jointly referred to as the telephone company, and twenty-seven hotels in the District of Columbia (R. 1, 2).

Section 203, in so far as it is here pertinent, by subdivision (a) requires "Every common carrier" to file with the Commission "schedules showing all charges for itself and its connecting carriers for interstate and foreign wire * * * communication * * * and showing the classifications, practices and regulations affecting such charges," and by subdivision (c) provides that

"no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication or for any service connected therewith * * * than the charges specified in the schedule then in effect, or * * * (3) extend to any person any privilege or facilities in such communication, or employ * * * any * * * practices affecting such charges, except as specified in such schedule."

It is not alleged nor has it been found or proved that the hotels are "common carriers" or "carriers".

Nevertheless it is alleged that the hotels violate these provisions by their long-established practice of making so-called service charges to their guests who avail

* These and other statutory provisions involved are reproduced in the Appendix hereto.

themselves of the facilities afforded to them by the hotels for making toll telephone calls from their hotel rooms and of the services of the hotels in placing such calls, taking messages, etc. These service charges are designed to compensate the hotels for the substantial expense which they incur in providing telephones and equipment in hotel rooms, operating the PBX switchboards through which the lines in the hotel are connected with the trunk lines of the telephone company, paging guests, taking messages and performing various other services generally described as "secretarial". These service charges are billed to guests by the hotels as a separate item on their hotel bills and are retained by the hotels (R. 61). The hotels also charge their guests the exact amounts of the charges of the telephone company for their respective calls, for which telephone charges the telephone company bills the hotels as subscribers, just as it bills other subscribers. The telephone company does not bill the guests but looks to the hotels for payment (R. 61).

It is alleged that the collection of these service charges by the hotels has violated Section 203 of the Act since February 15, 1944, on which date it is contended that there became effective a new tariff schedule filed with the Commission by the telephone company, which provides:

> "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club, in addition to the message toll charges of the Telephone Company as set forth in this tariff."

Notwithstanding that the hotels are not carriers and that Section 203, by its terms, applies only to carriers, and notwithstanding that the service charges collected by the hotels are retained by them and are not in any way remitted to or received by the telephone company, which receives only its tariff rates, the complaint alleges that

> "*each* of the defendants has illegally continued and is illegally continuing to charge, demand, collect, or receive surcharges or service charges for and in connection with interstate and foreign message toll telephone communications * * *." (R. 10)

The hotels, by their answer, denied any illegality on their part in collecting their service charges, denied the validity of the tariff schedule or that it ever became legally effective, denied that their service charges were subject to the provisions of the Communications Act of 1934 or the jurisdiction of the Commission or that they could be regulated in any way by tariffs filed by the telephone company with the Commission, denied the enforceability of the tariff schedule against them, and denied the jurisdiction of the court to issue the injunction prayed for against the hotels (R. 42-45).

The telephone company, by its answer, denied unlawful conduct on its part (R. 47-50).

A motion by the Commission for a temporary restraining order was denied (original record 112, omitted in printing) and the case was tried before District Judge O'Donoghue without a jury.

The Services and Service Charges of the Hotels*

In the lobbies or other accessible locations of all of the defendant hotels, telephone booths have been installed and are available to persons in the hotels, by means of which calls can be made without involving the services of the hotels and their personnel. Charges for these calls are paid directly to the telephone company through coin boxes and are at the tariff rates of the telephone company without any additional charge being made or collected by the hotels (R. 62).

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* At the trial of the case on April 26 and 27, 1944, the evidence was limited to the situation at one hotel, namely, The Shoreham, and it was stipulated that the testimony in regard to the facts at the other hotels would be substantially the same (R. 101, 169).

However, the hotels, as a part of their hotel service to their guests, have made it possible for guests to make and receive telephone calls in their rooms by having telephones installed therein connected with the so-called PBX switchboards of the hotels and have also customarily provided numerous message and secretarial services to their guests in connection with telephone messages (R. 57, 60). The telephone company, by regulation, refuses to permit any telephone equipment not procured from it to be connected with its trunk lines, and therefore the telephone instruments in the hotel rooms and the wiring therefor, as well as the PBX switchboard through which the connection is made, must be procured from the telephone company (R. 132, Finding 6, R. 57) although there is other equipment that might be used (R. 132).

The telephone equipment of a hotel consists basically of a private switchboard, known as a PBX board, and extension lines from the switchboard to the rooms, with telephone instruments at the end of each extension line. The trunk lines of the telephone company come to the switchboard and there connect with the hotel's equipment (R. 98). There is various other auxiliary equipment, and the equipment of the Shoreham, which is typical, was described by a witness as follows:

> "The Shoreham has a 6 position switchboard with 39 trunk lines, 2 auxiliary lines, 855 stations, 204 directory listings, 2 mine sets, 2 wiring plans, 8 buzzer circuits, 4 gongs, 29 bells, and a 4-line conference equipment, one booth, 2 additional stations, one lamp indicator, 8 operator sets, 11 long distance terminal loops or trunks, 7 wiring plans #203 and 600 feet of mileage for an off-premise station." (R. 102)

The amount and type of equipment in a hotel is entirely a matter of the hotel's choice (R. 128).

The equipment in the hotel is exclusively under the management and control of the hotel, and is manned by employees of the hotel (R. 128). The cost of the equipment is borne by the hotel in the form of a monthly charge paid

to the telephone company for use of the equipment, and the employees who man the equipment are paid by the hotel (R. 58, 128). Indeed, the telephone company by a tariff provides "All operating at the subscriber's premises must be performed at the expense of the subscriber—" (R. 220). This cost is substantial, the cost to the Shoreham in 1943 being $8,680.10 for use of the equipment, and $21,895.62 for payroll (R. 162).

The telephone equipment in the hotel, beginning with the switchboard, is self-contained, needs no outside service or operator (R. 131) and the service of the telephone company is required only when a call goes outside the hotel, that is to say, on the exterior side of the switchboard (R. 131).

The hotel subscribes to and receives from the telephone company the usual telephone service which is furnished to any business establishment, office, or other subscriber having a private switchboard (R. 128). This service is known as Private Branch Exchange, or PBX, service. There is no difference between the private switchboard installations in, and the service rendered to, hotels and the installations in, and the service rendered to, any private switchboard subscriber, either in available equipment and the charges therefor, or service rendered and the charges therefor (R. 128).

In addition to procuring and paying for the interior telephone equipment, and paying for the operators who man it, the hotel furnishes a variety of services to guests who use the telephones. These can be described best as secretarial services and are comparable to the services rendered by a secretary in a private office (R. 60, 164). As examples, the hotel operators will place and complete long distance calls for a hotel guest (R. 164), thus permitting the guest to go about his business until the called person is ready. This may take several hours in the case of a call to a distant phone when the circuits are busy (R. 161). Incoming messages are received during a guest's absence and memoranda of them left for him (R. 165). Outgoing

messages are transmitted for a guest who will be absent at the time the called person is reached or who has not the time or inclination to deliver them personally. Guests may leave word where they will be at a designated time and calling persons are given this information by the hotel operators. Guests who may not be at the telephones in their rooms are located by hotel employees and called to the phone (R. 165). Guests who are not even in the hotel when an incoming call is received will be reached where possible and advised of calls (R. 165). Guests wishing telephone service suspended for a period are given this protection (R. 166), and guests may advise the hotel operator that they will receive calls only from designated people and the operator suspends all other calls (R. 166). The services of this nature are manifold (R. 165).

The telephone company is not permitted under its tariffs to render these services which are rendered by the hotel (R. 59, 209, 210, 129). Its tariff provides

> "14. The Company will not transmit messages * * *. Employees of the Company are forbidden to accept either oral or written messages to be transmitted over the lines of the Company." (R. 230)

To reimburse itself for the cost of the facilities furnished and services rendered to their guests, it has long been the practice in the hotel to make a service charge to their guests. This charge has been ten cents per toll call where the telephone tariff charge is one dollar or less, ten per cent of the telephone tariff charge where such charge is more than one dollar, with a maximum charge of three dollars per call (R. 150).

The guest is also charged the regular tariff rate which the hotel pays to the telephone company for the toll call (R. 60).

The telephone company has nothing whatever to do with the charges made by the hotel to its guests (R. 131). It looks to the hotel to pay the telephone bill based on the tariff charges, and knows nothing of what the hotel may collect (R. 120). The telephone company gets no part of the charge collected by the hotel from its guests (R. 120).

The Proceedings Before the Federal Communications Commission

The tariff provision of the telephone company upon which this action rests was filed following and in supposed compliance with an order made by the Commission in a proceeding conducted by it.

The Commission's report indicates that it was led to its conclusion by its conception of the policy which ought to be reflected in the Act rather than by an analysis of the statute itself. The Commission said:

> "If the collection of such surcharges were not subjected to regulatory control, a subscriber, or anyone else other than the telephone company, who is permitted by the telephone company to control access to the use of a telephone, could freely resell interstate and foreign telephone service, imposing any charges of his own on such use." (R. 26)

The Commission said there were three possibilities as to "responsibility for the surcharge"; either (1) that they are charges of the telephone company on the ground that the hotels are its agent for collection; (2) that the hotels are connecting carriers for hire and themselves subject as carriers to the Communications Act; or (3) that the hotels, as subscribers, receive telephone service "subject to such tariff provisions as may apply" (R. 27, 28). The Commission then found that the hotels "are agents of the respondents" (R. 29, 30), and that any charge for the services rendered by the hotels "must be properly shown in effective tariffs" filed by the telephone company (R. 30). The Commission expressly omitted any finding as to whether the hotels were connecting carriers (R. 30). But notwithstanding its finding that they were agents it found them to be subscribers (R. 30). And it concluded that the tariff of the telephone company which should be filed to show any service charges made by the hotels "may consist of a tariff regulation * * * which contains specific provisions with respect to the conditions upon which telephone service * * * is furnished * * * to hotels * * *." (R. 36)

The Tariff Schedule of the Telephone Company

It should be noted that the Commission's order did not require the telephone company to file a schedule which would attempt to prevent the hotels from making any charge whatever for their services but simply required it to file a schedule stating what service charge would be permitted.

However, on January 22, 1944, the Chesapeake and Potomac Telephone Company filed a tariff with the Federal Communications Commission, purporting to become effective February 15, 1944, which contained the following provision:

> "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff." (R. 62, 63)

The Institution of This Suit

Not only had the Commission's order not required the telephone company to file a schedule designed to bar any service charge by the hotels, but the Commission in its proceeding had made no investigation whatever of the services of the hotels or of the costs incurred by them for which their service charges were made.

Nevertheless, the ink was hardly dry on the telephone company's new schedule when the Commission, through the Attorney General, instituted this suit to enforce compliance with the schedule and to enjoin the hotels from making their service charges.

Not only this but the Commission asked that a temporary restraining order be issued forthwith, at once restraining the hotels from making their charges upon which for many years they had relied to reimburse themselves for the substantial expenses incurred by them. As has been said, this

temporary restraining order was denied and the case proceeded to trial on the merits.

The Decision of the District Court

The District Judge concluded that

> "from the facts in this case it appears that the telephone companies are not violating the tariff schedules at all, and therefore there is no remedy that should be granted at this time against the telephone companies for any acts of their own." (R. 54)

The Commission had based its decision upon its finding that the hotels were the agents of the telephone company and for this reason had ruled that they should make no service charges, except as provided for in schedules of the telephone company.

The District Court, however, overruled this conclusion and expressly found that the hotels were not agents of the telephone company (R. 63). The District Judge correctly said that the evidence

> "fails to show that these hotels are the agents of the telephone company. There was no written agreement to that effect introduced here; there was no oral agreement to that effect introduced here; and there is no testimony, written or oral, from which this Court could imply the existence of any agency in the hotels on behalf of or as agent of the telephone company." (R. 52)

Judge O'Donoghue ruled that "the hotels are subscribers." (R. 52)

There is nothing in the statute that requires that the charges of subscribers for their services and expenses must be specified in or are to be controlled by tariffs of the telephone company. The District Judge, however, argued that if a hotel as a subscriber

> "undertakes, when the messages are going through, to render services to the guests, and then undertakes to

surcharge and make the charge go above, in amount, the tariff schedule, that would be doing indirectly what the telephone company is not allowed to do, and what the law, by its express and implied terms * * * did not mean to allow." (R. 53)

Since, as we shall argue more fully hereafter, Section 203 prohibits only carriers from collecting charges otherwise than strictly in accordance with their tariff schedules, and the District Court found that the "telephone companies are not violating the tariff schedules", it would seem to follow inevitably that there was and could be no violation of Section 203 at all, and that the action should have been dismissed.

Nevertheless, on the ground that "the hotels know what they are doing" and despite the fact that they are not carriers or agents of the telephone company, that the tariff is not theirs and that the statute contains no words or prohibition directed to subscribers, the District Court concluded that

> "they (the hotels) are violating this tariff schedule of the Federal Communications Commission, they are violating the law, and violating the rules of the Federal Communications Commission, and should be enjoined accordingly." (R. 55)

In the conclusions of law the District Court stated the matter thus (R. 66):

> "9. The collection by defendant hotel companies from users of interstate and foreign message toll telephone service of an extra charge, or surcharge, in addition to the regular tariff charges specified in the effective and applicable tariff schedules of defendant telephone companies on file with the Federal Communications Commission, and the Federal tax on such service, is contrary to the above tariff regulation. The collection by defendant hotel companies of any such surcharge is therefore illegal and should be enjoined. The defendant telephone companies are not violating said tariff regulation by any act or omission of their own, and are not responsible for the violations being committed by the hotels."

Other Related Proceedings

The conclusions of law of the District Court refer to the pendency of a three-judge court proceeding (R. 67). Although not fully set out in the printed record, we think the Court should be informed of this and other proceedings which are pending.

(1) Upon the issuance by the Commission of its order, pursuant to which the telephone companies filed their tariff schedule, the hotels instituted a suit in the District Court, as provided in Section 402 of the Act, to annul the order on the ground that it was invalid and based upon errors of law. Because of the bringing of the present action to enforce compliance with the tariff filed pursuant to the order, the hotels' suit has not been brought to trial.

(2) When the tariff schedule was filed by the telephone company, the American Hotel Association, on behalf of its members, including the hotels here, petitioned the Commission to enter into an investigation of its reasonableness and legality and to suspend its operation pending such investigation, as the Commission had power to do under Section 204 of the Act. This the Commission declined to do. Thereupon the American Hotel Association filed a formal complaint with the Commission alleging that the new provision in the tariff schedule was unreasonable, discriminatory and unlawful and asking an investigation, but at the same time asserting that the tariff was illegal because it purported to regulate charges of hotels for their services which were not within the purview of the Act nor subject to the Commission's jurisdiction. Action on that complaint has been held in abeyance pending the final decision on the jurisdictional question in this suit.

(3) Two other suits to enforce compliance with similar schedules of the American Telephone & Telegraph Com-

pany and its corresponding local affiliates have been instituted by the United States at the request of the Commission—one in the United States District Court for the Southern District of New York, and the other in the United States District Court for the Northern District of Illinois. The facts in these two other cases, while in large part similar to those present here, differ in certain important respects, notably, that the schedules there involved were not filed in supposed compliance with any order of the Communications Commission and that the legality of the schedules was challenged on the ground that they had not been filed in accordance with the requirements of the Act. In the New York case the District Court has rendered a decision in favor of the Government and an appeal has been taken to this Court. As yet this Court has not noted probable jurisdiction, *Hotel Astor, Inc. et al.* v. *United States of America, et al.*, No. 823. The Illinois case has been argued in the District Court but no decision has as yet been rendered.

Specification of Errors

The appellants intend to urge the following assigned errors (R. 291-298):

1. The Court erred in concluding as a matter of law that,

> "The tariff regulation with respect to interstate and foreign message toll telephone service filed with the Federal Communications Commission by defendant The Chesapeake and Potomac Telephone Company on January 22, 1944, to be effective February 15, 1944, and formally concurred in by defendant American Telephone and Telegraph Company, providing that 'Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company' as set forth in its tariffs, is a legally effective tariff regulation under the provisions of the Communications Act of 1934, as amended, applicable to interstate and foreign message toll telephone service to or from telephone instruments located on the premises of defendant hotel companies. This tariff regulation is binding both on defendant telephone companies and on each of the defendant hotel companies." (Concl. of Law 8.)

2. The Court erred in concluding as a matter of law that,

> "The collection by defendant hotel companies from users of interstate and foreign message toll telephone service of an extra charge, or surcharge, in addition to the regular tariff charges specified in the effective and applicable tariff schedules of defendant telephone companies on file with the Federal Communications Commission, and the Federal tax on such service, is contrary to the above tariff regulation. The collection by defendant hotel companies of any such surcharge is therefore illegal and should be enjoined. * * *" (Concl. of Law 9.)

3. The Court erred in concluding as a matter of law that,

> "Any questions as to the justness and reasonableness of the above tariff regulation should be first submitted to the Federal Communications Commission for its determination under the Communications Act of 1934, as amended, and any such questions may be properly submitted to a Court, only after a prior determination by that Commission." (Concl. of Law 10.)

4. The Court erred in concluding as a matter of law that,

> "A permanent injunction shall issue restraining the defendant hotel companies, and each of them, and all persons acting under the authority or control of each of them, including their officers, agents, and servants, from charging, demanding, collecting, or re-

ceiving any charge for and in connection with any interstate or foreign message toll telephone service to or from the premises of defendant hotel companies, other than the message toll telephone charges set forth in the applicable and effective tariff schedules of defendant telephone companies on file with the Federal Communications Commission, and the applicable Federal taxes." (Concl. of Law 14.)

5. The Court erred in concluding as a matter of law that,

> "The surcharges being collected by defendant hotel companies from users of interstate and foreign message toll telephone service to and from the premises of defendant hotels are charges for and in connection with interstate and foreign telephone toll communication service, within the meaning of the Communications Act of 1934, as amended." (Concl. of Law 6.)

9. The Court erred in finding as a fact that,

> "The effective tariff schedules of defendant telephone companies on file with the Federal Communications Commission for message toll telephone service apply to interstate and foreign message toll telephone service between all stations located on the premises of defendant hotels, including PBX extension stations, and telephone stations located outside the District of Columbia. The tariff schedules of defendant telephone companies on file with the Federal Communications Commission include the following effective provision, which is applicable to all of their interstate and foreign message toll telephone service:
>
> > 'The toll service charges specified in this tariff are in payment for all service furnished between the calling and called telephones.' " (Finding 8.)

10. The Court erred in failing to find as a fact and to conclude as a matter of law that the tariff schedules of defendant telephone companies on file with the Federal Communications Commission for message toll telephone

service apply only to service beyond the PBX switchboards of the defendant hotel companies.

11. The Court erred in failing to find as a fact that the provision that,

> "The toll service charges specified in this tariff are in payment for all service furnished between the calling and called telephone"

applies only to telephone service beyond the PBX switchboards of the defendant hotel companies and should be so interpreted.

12. The Court erred in failing to find as a fact that the additional charges made by the defendant hotels to their guests when such guest makes a toll telephone call are charges for the services described in the 13th finding of fact of the Court, which the defendant hotel companies render or are prepared to render to their guests.

13. The Court erred in finding as a fact that,

> "The surcharges being collected by defendant hotel companies are charges imposed against the users of interstate and foreign message toll telephone service. They are made only when such service is used, and they are a part of the charge made to the users of interstate and foreign message toll telephone service in connection with such use. These surcharges are collected by the defendant hotel companies in connection with interstate and foreign telephone toll communication service." (Finding 23.)

14. The Court erred in holding "that the Federal Communications Commission likewise had jurisdiction of the matter of the tariff schedules and so on", and in failing to hold that the Federal Communications Commission had jurisdiction only to the extent that the tariff schedules were valid. (Tr. P. 348)

15. The Court erred in holding that,

"Any relief along the lines of the tariff schedules that the hotels here may wish, or that the telephone companies here may wish, should be taken up before the Federal Communications Commission." (Tr. P. 348)

16. The Court erred in holding that,

"* * * if someone who has gotten telephone facilities as a subscriber, from the telephone company —and they have gotten those facilities for their own benefit, to accommodate their guests in the hotel— undertakes, when the messages are going through, to render services to the guests, and then undertakes to surcharge and make the charge go above, in amount, the tariff schedule, that would be doing indirectly what the telephone company is not allowed to do, and what the law, by its express and implied terms, and by the regulations of this Commission, and its orders, did not mean to allow." (Tr. P. 353)

17. The Court erred in holding that the defendant hotel companies are,

"* * * violating this tariff schedule of the Federal Communications Commission, they are violating the law, and violating the rules of the Federal Communications Commission, and should be enjoined accordingly." (Tr. P. 356)

18. The Court erred in holding that,

"The Court will grant an injunction restraining the hotels from adding these surcharges to the bills of the guests of the hotels, in addition to the regular charge for the interstate toll charges." (Tr. P. 356)

19. The Court erred in holding that the tariff schedules and the tariff regulation contained therein, filed January 22, 1944, by the Chesapeake and Potomac Telephone Company, purporting to become effective February 15, 1944, were valid.

20. The Court erred in failing to hold that the tariff schedule and the tariff regulation contained therein filed on January 22, 1944, by the Chesapeake and Potomac Telephone Company, purporting to become effective February 15, 1944, were not valid in so far as they attempt or purport to prevent the defendant hotel companies from making a charge for hotel services rendered.

21. The Court erred in failing to conclude as a matter of law that the tariff schedule upon which this action was based was illegal, invalid and unenforceable in that it represented an attempt of the defendant, the Chesapeake and Potomac Telephone Company, to regulate the charges of the defendant hotel companies to their guests for hotel services, in that it failed to conform to the provisions of Section 203 of the Communications Act of 1934, and in that by it the said telephone company illegally attempted to make the furnishing of telephone service to subscribers conditioned upon the conduct by said subscribers of their own business activities.

22. The Court erred in failing to find as a fact that the PBX switchboards, the extension stations and connecting lines within each hotel constitute self-contained systems for internal communication.

23. The Court erred in failing to find as a fact that the defendant hotel companies specify the equipment they require, that other equipment is available and could be procured were it not for the refusal of the telephone company to make connection with any equipment not rented from it.

24. The Court erred in failing to find as a fact that the telephone company receives no part of the service charges made by the defendant hotel companies.